Supreme Court, U.S.
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No. 93-___

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

Elizabeth Ridgeway, *et al.*,
Petitioners,

v.

Pfizer, Inc., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in holding -- in conflict with other courts of appeals -- that class members who object to a class certification and proposed class action settlement, and vigorously participate in the district court proceedings, must formally move and be permitted to intervene in order to appeal the district court's certification of the class and approval of the settlement?

2. Whether class members who object to a class certification and proposed class action settlement may constitutionally be denied their right to appeal on the sole ground that they failed to intervene, where the court-ordered notice to the class did not specify intervention as a condition for appeal, the district court and the settling parties treated the objecting class members as *de facto* intervenors throughout the proceedings, and the published decisions of the court of appeals unequivocally hold that intervention is not required to confer appellate standing on objecting class members?

PARTIES TO THE PROCEEDING

In addition to petitioners Elizabeth Ridgeway, Rosemary Grunsby, and Fred Grunsby, each of whom appeared as Class Members-Appellants in the Sixth Circuit proceeding, respondents Arthur Ray Bowling, *et al.*, appeared as Plaintiffs-Appellees and respondents Pfizer, Inc. and Shiley Incorporated appeared as Defendants-Appellees before the Sixth Circuit.

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OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit dismissing petitioners' appeal is reported at 14 F.3d 600 (Table) (1994) and is reproduced in the petitioners' appendix at 1a. The order of the United States Court of Appeals for the Sixth Circuit denying petitioners' petition for rehearing *en banc* is reproduced in petitioners' appendix at 3a.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1993. 1a. Petitioners filed a timely petition for rehearing on January 3, 1994, which was denied by the court of appeals on March 4, 1994. 3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition arises out of a district court's certification of a class and approval of a class action settlement involving 50,000 to 100,000 heart-valve implantees who reside all over the world.[1] As recounted in further detail below, petitioners are unnamed class members who complied fully with the district court's order notifying them of the steps to take to object to the proposed class certification and settlement. However, in keeping with the court's order and established Sixth Circuit precedent, they did not move formally to intervene in the case prior to the district court's decision approving the settlement. When they appealed the district court's order certifying the class and approving the settlement, the Sixth Circuit issued an unpublished order dismissing their appeal on the ground that, because they had not formally intervened in the

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[1] The district court had jurisdiction pursuant to 28 U.S.C. § 1332. For the Court's convenience, copies of the district court's opinion approving the settlement, which is reported at 143 F.R.D. 141 (S.D. Ohio 1992), have been lodged with the Clerk. This petition does not seek review of the merits of that decision, but rather of the Sixth Circuit's order dismissing petitioners' appeal for lack of standing.

district court, they lacked standing to seek appellate review of the settlement's approval. In so ruling, the Sixth Circuit contradicted its own prior published decisions and deepened an already vast split among the federal circuits with respect to the question presented in this case -- *i.e.*, whether class members who respond to a court-ordered notice inviting them to object to a proposed class certification and a proposed settlement must intervene in order to have standing to appeal.

Petitioners are Elizabeth Ridgeway and Rosemary Grunsby, both of whom presently have implanted in them "Bjork-Shiley" heart valves manufactured and distributed by respondents Pfizer, Inc. and its wholly owned subsidiary, Shiley Incorporated (collectively, "Pfizer"), and Fred Grunsby, the husband of Rosemary. Although petitioners' heart valves have not yet fractured, petitioners live with the fear that their valves will fracture at any time.[2]

Prior to becoming involved as objectors to the class certification and settlement in this case, petitioners were the named plaintiffs in a class action filed in a Pennsylvania state court seeking compensatory and punitive damages against Pfizer on behalf of a class of pre-fracture implantees with a nexus to Pennsylvania. *Taylor v. Shiley*, Court of Common Pleas, First Judicial District of Pennsylvania, Civil Trial Division (Philadelphia) February Term, 1986, No. 2087. Among other things, petitioners alleged in *Taylor* that Pfizer defrauded them,

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[2] From 1979 to 1986, Pfizer produced thousands of Bjork-Shiley heart valves. Somewhere between 50,000 and 100,000 of these valves are implanted in patients from all over the world. It is estimated that about 450 of these heart valves have fractured, resulting in approximately 300 fatalities. Pfizer's critics allege that these heart valves have a tendency to fracture because of design and manufacturing defects. *See Bowling*, 143 F.R.D at 147. Ultimately, under extreme pressure from the United States Food and Drug Administration ("FDA"), Pfizer recalled all its heart valves. *See Michael v. Shiley, Inc. et al.*, No. 93-1729, 1994 U.S. Dist. LEXIS (E.D. Penn. Feb. 25, 1994, as amended March 31, 1994).

their doctors, and the FDA by continuously providing incomplete and misleading information regarding the number of strut fractures occurring in the Bjork-Shiley valves.

The *Taylor* action is significant because, whereas Pfizer had succeeded in obtaining dismissals of 27 pre-fracture heart-valve cases in other jurisdictions on legal grounds, the court in *Taylor* had upheld petitioners' causes of action for fraud, intentional infliction of emotional distress, and breach of warranty. *See Bowling*, 143 F.R.D. at 147.[3] Thus, unlike plaintiffs in most other jurisdictions, petitioners in *Taylor* were well situated to obtain a sizable recovery against Pfizer on behalf of the putative Pennsylvania class.

On June 30, 1989, after the decision rejecting Pfizer's motion to dismiss in *Taylor* and after numerous discovery disputes and motions had been resolved, petitioners filed a comprehensive motion for certification of the *Taylor* class. In response, Pfizer filed a skeletal answer to the motion for class certification along with a voluminous motion for summary judgment that raised numerous factual issues. Over petitioners' objections, the court ordered that it would not consider the earlier-filed motion for class certification until it disposed of Pfizer's motion for summary judgment. After many months of discovery disputes relating to Pfizer's summary judgment motion, the court finally granted petitioners' discovery motions. Pfizer responded with an offer to produce over six million documents stored in a litigation warehouse in California. The court in *Taylor* ordered Pfizer to provide indices of the documents.

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[3] In those 27 cases, Pfizer obtained summary judgment on the ground that a plaintiff may not recover for her fear or anxiety that a heart valve may fracture in the future. *Id.* Petitioners overcame that hurdle in *Taylor* because, unlike most other plaintiffs, they went beyond merely alleging negligence and product liability theories and pled causes of action based on fraud and other intentional torts.

On March 28, 1991, while petitioners' counsel were reviewing the thousands of pages of indices provided by Pfizer and other discovery was being pursued in *Taylor* (but before there was a ruling on class certification), a Cincinnati law firm filed a class action complaint in the United States District Court for the Eastern District of Kentucky that alleged a putative class consisting of all persons in the United States with Pfizer's 60-degree heart valves. *Wright v. Pfizer*, CA. No. 91-58 (E.D. Ky. March 18, 1991). Less than one month later, and with the concurrence of Pfizer, the same law firm filed the identical complaint in federal court in Cincinnati on behalf of the same named plaintiffs (but adding one Ohio resident), seeking certification of the identical class. F 1.[4] That firm then abruptly abandoned the Kentucky case, *Wri* in favor of the Ohio case, *Bowling*. *See* 143 F.R.D. at 148. Both of these filings were without the knowledge of petitioners or class counsel in *Taylor*.

Shortly after the filing of the complaint in *Bowling*, class counsel and Pfizer privately agreed to stipulate to class certification and settle the case. On January 23, 1992, the district court signed a perfunctory order conditionally certifying a class under Fed. R. Civ. P. 23(b)(3) that is much broader in scope than the class alleged in the complaint and which, by stipulation of counsel, now includes in its sweep all recipients of 60-degree heart valves and recipients of a different product -- 70-degree heart valves -- and their spouses, wherever they might reside, anywhere on earth. *Compare* RA 1 (class action complaint) *with* RA 43 (notice of class action settlement). During the period between the filing of the *Bowling* complaint and the date the settlement was announced, class counsel had taken only nominal discovery, at best. *See Bowling*, 143 F.R.D. at 161.

In February of 1992, petitioners received notice for the

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[4] Citations to "RA" are to the record on appeal filed with the Sixth Circuit in connection with petitioners' appeal of the district court's decision approving the *Bowling* settlement.

first time that a federal district court in Ohio had certified a global class under Fed. R. Civ. P. 23(b)(3) that included all recipients of Pfizer's heart valves that had not yet malfunctioned, as well as the spouses of those recipients. RA 43. The *Bowling* notice stated that, if the settlement were approved, petitioners' claims against Pfizer would be terminated, unless petitioners elected to opt out of the class. The notice informed petitioners that they could not object to the class certification or the proposed settlement if they elected to opt out of the class and that, if they wanted to participate in the fairness hearing, they or their attorney must file an appearance. There was no suggestion in the notice that petitioners would have to intervene in order to have standing to appeal any decision approving the settlement over their objections. *Id.*

The proposed settlement described in the notice essentially provided a small cash payment "of some amount less than $4000" for pre-fracture implantees, a fund for medical research designed to discover a medically-safe diagnostic technique to predict when a fracture might occur (relief that was of little benefit to the overwhelming majority of class members), a system of compensation for fracture victims, and a restricted explantation fund. *See Bowling*, 143 F.R.D. at 140. The *Bowling* notice said nothing about the *Taylor* class action that was pending simultaneously for the benefit of thousands of *Bowling* class members with a nexus to Pennsylvania. RA 43.

The *Bowling* class notice came as a complete surprise to petitioners since Pfizer had notified neither them nor the judge in Pennsylvania that Pfizer (a party-defendant in *Taylor*) had agreed to settle an overlapping class that would effectively terminate the rights of the putative class members in *Taylor*. Because Pfizer had been successful in retarding the progress of *Taylor* with extended motion practice and discovery disputes, the Pennsylvania court had not yet reached the point of ruling on the class certification motion in *Taylor* or of ordering notice to the *Taylor* class. In addition, petitioners did not know the names and addresses of the putative class members in *Taylor* because Pfizer had refused to provide this

information in discovery. As a result, the thousands of putative class members in *Taylor* had no way of knowing that they had a potentially attractive alternative to the proposed settlement described in the *Bowling* notice.

At this point, petitioners were faced with the dilemma of whether to opt out of the *Bowling* class or remain in as objectors. On the one hand, petitioners realized that, if they opted out of *Bowling*, they could pursue their individual claims in *Taylor* and hope to achieve monetary recoveries that would dwarf the $4,000 or less they would receive from the *Bowling* settlement. On the other hand, if petitioners opted out, they would lose the opportunity to object to class certification and the *Bowling* settlement, with the result that thousands of putative class members in *Taylor* (who did not know about the potential benefits *Taylor* offered as an alternative to the *Bowling* settlement) would have their causes of action against Pfizer extinguished by virtue of the judgment and settlement in *Bowling*. Petitioners ultimately determined that they could not opt out because, as they saw it, they had a fiduciary responsibility to protect the rights of the members of the putative Pennsylvania class whom they sought to represent in Pennsylvania state court.

On May 5, 1992, having decided that they had no real choice but to remain in the class, petitioners filed timely appearances and written objections to the proposed settlement. RA 72, 143. Thereafter, petitioners were allowed to participate fully in all aspects of the district court proceedings, including the fairness hearing held on June 5, 8, and 9 and July 22, 1992. *See Bowling*, 143 F.R.D. at 146.[5]

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[5] Thus, petitioners: (a) filed and obtained rulings on numerous substantive and procedural matters, RA 83, 97, 113, 140, 145, 158, 168, 190, 202, 206-208, 211, 216, 229, 235, 230, 250, 221; (b) obtained in response to their written and oral motions an explicit written order granting their right to be heard and to participate, *see Bowling*, 143 F.R.D. at 147, RA 229, 250; (c) made substantive oral presentations and arguments at each settlement-related hearing

Petitioners had no reason to intervene in the district court proceedings, since the class notice did not require intervention and two published decisions of the Sixth Circuit hold that intervention is not necessary to confer standing on an objecting class member to appeal a district court decision approving a class action settlement. *See Sertic v. Cuyahoga Lake, Etc., Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972); *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942).[6] At no point during the course of the fairness hearing did the district court, Pfizer, or class counsel suggest that intervention was necessary or appropriate. In fact, at every juncture in the proceedings, the district court gave every indication that intervention was *not* required, even to the point of permitting petitioners' counsel to file a *pro forma* fee petition because petitioners intended to appeal the settlement's approval, and further allowing them to defer the filing of a comprehensive fee petition until their Sixth Circuit appeal was resolved. RA 256.

Petitioners moved repeatedly in the district court to certify a subclass of Pennsylvania residents. *See Bowling*, 143 F.R.D. at 161; RA 159, 190, 207, 208, 221, 251. The basis for petitioners' request for a subclass was that the Pennsylvania court in *Taylor* had entered an order denying essentially the same motion to

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and proceeding, RA 97, 113, 140, 158, 202, 207, 208, 251; (d) were permitted to cross-examine and to question experts who had made presentations on behalf of the proponents of the settlement, RA 202; (e) took written discovery of class counsel and respondents, RA 83, 229; (f) marked numerous exhibits and introduced into the record affidavits and other evidence, RA 143, 190, 202, 208; (g) were invited to, attended, and participated in status conferences and hearings, RA 158; (h) raised issues and obtained court action on matters that were peculiar to petitioners, and were not raised by other parties, RA 143, 159, 190, 218, 221, 229, 210, 145, 168, 206, 211, 235, 250; and (i) had their Philadelphia-based counsel admitted *pro hac vice* and appeared as well through local counsel, RA 84, 99, 230, 272.

[6] As explained *infra* at Point III, two major treatises on class action procedure and two other courts of appeals also identify the Sixth Circuit as not requiring class members to intervene as a condition of appeal.

dismiss on which Pfizer had obtained favorable rulings in 27 other courts. *See* n.3, *supra*. Petitioners also had a viable claim for punitive damages, and there were no statute of repose or statute of limitations problems in *Taylor* -- problems that the settling parties in *Bowling* used to justify the nominal monetary recovery provided by the proposed settlement. Therefore, in petitioners' view, the putative class in *Taylor* had an advantage over class members in *Bowling* who were in jurisdictions bound by those 27 adverse rulings. Notwithstanding these arguments, the district court denied petitioners' motion to certify a subclass of Pennsylvania residents. *See Bowling*, 143 F.R.D. at 161; RA 250.

After the fairness hearing, on August 19, 1992, the district court issued an opinion and order in which it certified a final settlement class under Rule 23(b)(3) and approved the settlement with some modifications, several of which grew out of petitioners' objections at the fairness hearing. The district court's opinion was devoted primarily to the issues and arguments raised by petitioners. Indeed, the opinion describes petitioners as one of two "principal objectors" to the settlement. *Bowling*, 143 F.R.D. at 151. A final order was entered on September 9, 1992. RA 255.[7]

Petitioners filed a prompt notice of appeal to the Sixth Circuit on September 17, 1992. RA 258. A few days after filing the notice appealing the settlement's approval, petitioners were informed that Pfizer intended to file a motion to dismiss on the ground that petitioners lacked standing to appeal because they had not formally intervened in the case. Solely as a protective

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[7] The text of the reported opinion in *Bowling* begins at 143 F.R.D. 145 and ends on page 170. Page 145 describes some, but not all, of the written documents, pleadings, objections and motions petitioners had filed. The court described petitioners as "the Green firm," since petitioners' lead attorney was Gary Green, Esq. Thereafter, the court concentrated on matters raised by or pertaining to the Green firm on page 146 and from pages 151 through 167. Hence, *18* pages of the district court's opinion related to the participation of petitioners both before, during, and at the conclusion of the fairness hearing.

measure, and because the appeal period had not yet expired, petitioners filed in the district court on September 25, 1992 a motion to intervene in aid of their appeal. RA 265. On October 21, 1992, petitioners filed an amended motion to intervene and a motion under Fed. R. Civ. P. 60(b) requesting that, if the district court granted their motion to intervene, the date of the court's order relate back to the date on which petitioners entered their appearance in *Bowling*. RA 288.

By order dated November 9, 1992, the district court declined to rule on petitioners' intervention motions on the ground that the filing of the notice of appeal had created "uncertainty" about the court's continuing jurisdiction over the case. 5a. Petitioners filed a separate appeal from that order on December 2, 1992.

On March 2, 1993, Pfizer moved to dismiss petitioners' appeal of the decision approving the settlement on the ground that, notwithstanding their vigorous participation throughout the district court proceedings, petitioners lacked standing to appeal because they had not formally intervened in the case. In its brief, Pfizer placed heavy reliance on two *unpublished* Sixth Circuit decisions holding that unnamed class members must intervene in order to have standing to appeal. *See Police Officers for Equal Rights v. City of Columbus*, 865 F.2d 260 (Table) (1988); *Thompson v. Kentucky*, 827 F.2d 770 (Table) (1987).[8] Pfizer's sole discussion of the two *published* Sixth Circuit decisions that established a contrary rule -- *Cohen* and *Sertic* -- was in a footnote, in which Pfizer suggested that those cases had been overruled by the later, unpublished Sixth Circuit orders in *Police Officers* and *Thompson*. As to petitioners' pending motion to intervene, Pfizer argued that the district court lacked jurisdiction to decide the motion once the notice of appeal was filed and that, even if the district court had jurisdiction, the motion would have to be denied as untimely.

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[8] The reported decisions in these cases merely state that the appeals were dismissed.

In a two-paragraph order dated December 21, 1993, marked "Not Recommended for Full Text Publication" and signed by the court clerk, the Sixth Circuit dismissed petitioners' appeal on the ground that, "[b]ecause the appellants are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue the appeal." 1a. The unpublished order did not mention the Sixth Circuit's prior decisions in *Cohen* and *Sertic* establishing that intervention was not required. Nor did it mention the prior, unpublished orders in *Police Officers* and *Thompson* cited by Pfizer. Instead, it relied on decisions in three other circuits holding that intervention *is* required to confer appellate standing. 1a-2a.

In another order issued on December 21, 1993, the Sixth Circuit affirmed the district court's decision declining to rule on petitioners' motion to intervene. *See* 14 F.3d 600 (Table) (1994), reprinted at 6a. In this order, also marked "Not Recommended for Full Text Publication," the Court reasoned that the district court lacked jurisdiction to decide petitioners' motion to intervene because the filing of the notice of appeal of the settlement's approval had deprived the district court of jurisdiction over the case. 7a.

Petitioners then petitioned for rehearing *en banc* of the Sixth Circuit's order dismissing their appeal of the settlement's approval arguing, *inter alia*, that the panel's unpublished order contradicted two published Sixth Circuit decisions -- *Cohen* and *Sertic* -- holding that an unnamed class member did not have to intervene to have standing to appeal a final judgment or settlement. Petitioners pointed out that leading commentators on class action procedure have identified the Sixth Circuit as a jurisdiction where objecting class members have the right to appeal the approval of a class settlement without intervening as parties to the action, and further explained that other circuit courts had identified the Sixth Circuit as not requiring intervention to confer standing to appeal. *See infra* at Point III. Petitioners also asserted that, by dismissing their appeal in an unpublished order, the panel had taken the

extraordinary step of creating a non-precedent-setting ruling that contradicted published Sixth Circuit decisions, thereby depriving petitioners of their right to due process under the U.S. Constitution.

In a two-paragraph order dated March 4, 1994, which cited no authority and did not acknowledge the inconsistency between the published and unpublished decisions of the court, the Sixth Circuit denied the petition for rehearing. 3a.[9]

The result of the foregoing is that, unless this petition is granted, there will be no appeal of the *Bowling* settlement, even though it discriminates against class members -- like the Pennsylvania residents in *Taylor* -- whose home-state courts are hospitable to pre-fracture claims.[10] An additional result of the

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[9] On April 5, 1994, the district court finally ruled on petitioners' pending motion to intervene. In a two-paragraph order, the district court dismissed petitioners' motion, citing "the substantial delay between the approval of the settlement and return of the case to this Court, and the fact that intervention at this point would be prejudicial to the class . . .." 8a. On April 13, 1994, petitioners filed a motion pursuant to Rule 59(e) and Rule 24(a) and (b) of the Federal Rules of Civil Procedure seeking leave to intervene principally for the purpose of participating in the post-judgment proceedings. The district court has not yet ruled on this motion. In addition, on April 12, 1994, the district court denied a Rule 60(b) motion for relief from the decision approving the settlement that had been filed by petitioners in November 1993, while their appeal of the settlement's approval was pending before the Sixth Circuit. On May 3, 1994, petitioners filed a notice of appeal from that decision. On May 17, 1994, the Sixth Circuit issued an order directing petitioners to show cause why their appeal of the denial of the 60(b) motion should not be dismissed for lack of standing due to their failure to intervene. 9a.

[10] For example, as in *Taylor*, a California court has upheld a cause of action for fraud against Pfizer. *Khan v. Shiley, Inc.*, 217 Cal. App. 3d 848, 266 Cal. Rptr. 106 (4th Dist. 1990), *review denied*, 1990 Cal. LEXIS 1952 (May 3, 1990). As a result, nearly 1,000 class members opted out of *Bowling* to pursue their individual heart valve claims against Pfizer in California. According to news reports, at least 340 of these individuals ultimately obtained settlements in excess of $100,000 per pre-fracture implantee. *See* "$31-Million Settlement May

Sixth Circuit's ruling is that, unless this petition is granted, unsuspecting individuals who are affected by and object to the terms of other class actions in that jurisdiction will continue to rely on the published case law, object without formally intervening, and then have their appeals dismissed because of their failure to intervene.

REASONS FOR GRANTING THE WRIT

I. There Is A Deep Split In The Circuits As To Whether A Class Member Who Objects To A Class Certification And A Proposed Class Action Settlement Must Formally Move And Be Permitted To Intervene In Order To Appeal.

The first reason the writ should be granted is to resolve the deep split among the circuits on the precise question presented in this case: whether an unnamed class member who objects to a proposed class action settlement must formally move and be permitted to intervene in the case in order to appeal an order approving the settlement? *See generally* Timothy A. Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. 933, 934-40 (1993) (discussing circuit split). Only review by this Court will ensure uniformity in the procedure to be followed by an absent class member who wishes to preserve an opportunity for appellate review.

Three federal courts of appeals -- the Third, Seventh, and Ninth Circuits -- have consistently allowed objecting,

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Be in Works on Shiley Heart Valve," *Los Angeles Times*, p. D1 (October 17, 1992). The putative *Taylor* class could very well have achieved comparable recoveries in Pennsylvania if the district court had not denied petitioners' motion to certify a Pennsylvania sub-class and approved the *Bowling* settlement.

nonintervening class members to appeal approvals of settlement agreements.[11] These circuits' decisions are in accordance with the explanation of current law set forth in all three of the leading treatises on class action procedure in the federal courts. *See* James W.M. Moore, 3B *Moore's Federal Practice*, ¶ 23.80[5], at 23-496 (Matthew Bender, 1993) ("[a] member of a class who appears in response to the court's notice given pursuant to [Rule 23(e)], and objects to the dismissal or compromise has a right to appeal from an adverse final judgment although he did not become a formal party of record.") (footnote omitted); Herbert Newberg & Alba

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[11] *Third Circuit*: *Carlough, et al. v. Amchem*, 5 F.3d 707, 714 (1993) (denial of objecting class members' intervention motion not immediately appealable under collateral order doctrine since intervention would not be required to appeal merits of settlement); *Ace Heating & Plumbing Co., Inc. v. Crane Co.*, 453 F.2d 30, 33 (1971) (nonintervening, objecting class members have standing to appeal class action settlement). *Cf. Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1310 (1993) (nonintervening, objecting shareholders have standing to appeal approval of settlement in a derivative suit).

Seventh Circuit: *Armstrong v. Board of School Directors*, 616 F.2d 305, 327-28 (1980) (nonintervening, objecting class members have right to appeal from a class action judgment); *Patterson v. Stovall*, 528 F.2d 108, 109 n.1 (1976) (nonintervening, objecting class members have standing to appeal settlement agreement); *Research Corp. v. Asgrow Seed Company*, 425 F.2d 1059, 1060 (1970) (nonintervening class member who appears in response to Rule 23(e) notice and objects to a settlement has right to appeal from an adverse judgment). *Cf. In the Matter of VMS Ltd. Partnership Sec. Litig.*, 976 F.2d 362, 368 (1992) (unnamed class member must intervene in order to appeal post-settlement order implementing settlement agreement; distinguishing *Research Corp.* on factual grounds, but acknowledging its continued viability with respect to appeals of decisions approving settlements).

Ninth Circuit: In re Cement Antitrust Litig., 688 F.2d 1297, 1309 (1982) ("a class member may appeal from an order approving a settlement to which the member objects"), *aff'd*, 459 U.S. 1191 (1983); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (1981) (dissatisfied class member could have challenged settlement by direct appeal); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (1977) (unnamed class members appealing from the district court's approval of a class action settlement had "legal rights affected by the settlement and [thus] had standing to sue").

Conte, 1 *Newberg on Class Actions*, § 1.04, at 1-13 (McGraw Hill, 3d ed. 1992) ("[c]ertainly class members are parties for purposes of . . . objecting to and appealing from an order approving a class settlement . . ."); Charles A. Wright, *et al.*, 7B *Federal Practice and Procedure*, § 1797, at 360-61 (West, 2d ed. 1986) ("[o]f course, if the class member appears in response to the notice and puts forth his objections, he can attack the dismissal or compromise on appeal from the entry of the final judgment.") (footnote omitted).

The decisions holding that unnamed class members have standing to appeal a settlement's approval recognize that an appeal is often the only mechanism by which an absent class member can protect his or her rights. *See generally Ace Heating*, 453 F.2d at 33. Permitting class members to opt out of class actions does not provide adequate protection, since, in reality, "many small claimants frequently have no litigable claims unless aggregated." *Id.* Absent a right to appeal, "such claimants would be faced with equally unpalatable alternatives -- accept either nothing at all or a possibly unfair settlement." *Id.*

In contrary authority, the Fifth, Eighth, Tenth, and Eleventh Circuits have ruled that nonintervening, objecting class members lack standing to appeal an order approving a settlement between the named parties of a class action.[12] These courts have

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[12] *Fifth Circuit*: *Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554, 554 (1993) (appellate court lacks jurisdiction to consider appeal by class member who has not attempted to intervene as a named party); *Walker v. City of Mesquite*, 858 F.2d 1071, 1074 (1988) (unnamed members of certified plaintiff class lacked standing to challenge consent decree approving a settlement between the named parties).

Eighth Circuit: *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 679 (1992) ("unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so"), *cert. denied*, 113 S. Ct. 1251 (1993).

justified their rulings in part on the ground that "class actions could be unmanageable and nonproductive if each member could individually decide to appeal." *Guthrie*, 815 F.2d at 628. *See also Croyden*, 969 F.2d at 679; *Walker*, 858 F.2d at 1072. As other courts and commentators have pointed out, however, a rule requiring intervention will actually render class actions *more* unwieldy than simply permitting objecting class members to appeal. *See* Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. at 954. *See also infra* at Point II.B. (discussing fallacy underlying claim that rule requiring intervention increases judicial efficiency).

Prior to the decision in this case, petitioners believed that the Sixth Circuit's view accorded with that of the Third, Seventh, and Ninth Circuit's. Now, as a result of the proceedings below, it is difficult to state precisely where the Sixth Circuit stands on this issue. On the one hand, the two *published* Sixth Circuit decisions that relate to the rights of nonintervening class members to appeal a settlement's approval hold that intervention is *not* a prerequisite to appeal. *See Sertic*, 459 F.2d at 579; *Cohen*, 127 F.2d at 721.[13] *See also Steiner v. Fruehauf Corp.*, 121 F.R.D.

Tenth Circuit: *Gottlieb v. Wiles*, 11 F.3d 1004, 1012 (1993) ("the policy underlying class actions under Rule 23 is best served by requiring an unnamed class member in a class action under Rule 23 to move formally to intervene and to be granted intervenor status in order to gain standing to appeal the adequacy of the settlement").

Eleventh Circuit: *Guthrie v. Evans*, 815 F.2d 626, 627 (1987) ("a class member who is not a named plaintiff [ ] does not have standing to appeal the final judgment in [a] class action.")

[13] *Cohen* was a shareholder derivative suit in which an unnamed class member received notice of a proposed settlement, appeared at a hearing to oppose the settlement, and also moved to intervene in the action. The class member did not appeal the denial of the motion to intervene, but did appeal the decision approving the settlement. The defendants moved to dismiss for lack of standing on the ground that the stockholder "is not a party to this cause and hence has no

304, 307 (E.D. Mich. 1988) ("an objector . . . has a right to appeal from an adverse final judgment although he did not become a formal party of record"), *aff'd sub nom., Priddy v. Edelman*, 883 F.2d 438 (6th Cir. 1989). On the other hand, three *unpublished* Sixth Circuit orders -- including the order entered in this case dismissing petitioners' appeal -- unequivocally hold (without benefit of explanation or reasoning) that nonintervening class members have no standing to appeal a settlement's approval. *Bowling v. Pfizer, Inc.*, reprinted at 1a; *Police Officers for Equal Rights v. City of Columbus*, 865 F.2d 260 (Table) (1988); *Thompson*, 827 F.2d 770 (Table) (1987).

The lack of clarity as to the Sixth Circuit's stance is due to the fact that, according to the Sixth Circuit's own rules, only *published* decisions have any precedential value. *See* Sixth Circuit Internal Operating Procedure ("IOP") 22.4; *Watts v. Burkart, et al.*, 978 F.2d 269, 270 n.1 (6th Cir. 1992) (en banc); *U.S. v. Gomez-Lemos*, 939 F.2d 326, 336 (6th Cir. 1991) (concurring opinion). In addition, all published decisions are binding on subsequent panels, and court *en banc* consideration is required to overrule a prior published opinion. *See* 6th Circuit IOP 22.4. Since the orders in *Bowling*, *Police Officers*, and *Thompson* were not published, much less the product of *en banc* consideration, they have no precedential value and cannot properly be seen to have overruled the contrary, earlier decisions in *Cohen* and *Sertic*. Thus, if the Sixth Circuit is true to its own procedures, then *Cohen*

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standing in this court." The Sixth Circuit disagreed, stating that "[a]ppellant appeared in court in answer to the court's notice to show cause why the settlement should not be approved. This being the case, he was 'like a defendant who is summoned by process of court and after an adverse ruling has the right to appeal.' . . . Appellant is entitled to prosecute the appeal as of right." *Id.* at 724 (citations omitted). *Sertic* was a class action proceeding in which the Sixth Circuit cited *Cohen* as a basis for its decision permitting unnamed class members to appeal even though they had not succeeded in intervening before the district court. 459 F.2d at 579.

and *Sertic* remain the rule in that circuit, and intervention is *not* required to preserve an objectors' standing to appeal a settlement's approval. The ruling in this case, however, suggests that the Sixth Circuit now has two rules: one published and one "Not Recommended For Full Text Publication."

However one characterizes the Sixth Circuit's position, it is clear that the courts of appeals are deeply split on the issue presented in this case. Part of the confusion can be traced to this Court's decision in *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), a Title VII lawsuit in which a consent decree approving a settlement was challenged by individuals who were not parties to the litigation. (The certified class consisted of *Hispanic* police officers who claimed that a civil service examination they were required to take caused a disparate impact in promotion decisions. A group of *white* police officers who were neither members of the class nor of any of the groups of other white officers who *had* moved to intervene appealed the settlement eventually reached between the class and the city.) This Court affirmed the dismissal of their appeal, stating that, "because petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving the lawsuit's settlement." 494 U.S. at 304.

In the view of some circuit courts, *Marino* "provide[s] substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so." *Croyden*, 969 F.2d at 679; *see also Walker*, 858 F.2d at 1074. Other courts and commentators have disagreed, noting that, because the objectors in *Marino* were not even members of the class, that decision did not "settle[ ] whether an objecting member of the class or derivative litigation who is not a named party may appeal the court's approval of the compromise." *Bell Atlantic*, 2 F.3d at 1307; *see also* Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. at 946 (despite *Marino*, "lower courts . . . have decided that a nonparty

may sometimes appeal without prior intervention") (footnote omitted) (collecting cases); N.E. Paolini, *Recent Development: Walker v. City of Mesquite: The Nonappealability of Class Action Consent Decrees by Non-named Class Members*, 63 Tul. L. Rev. 1732 (June 1989) ("[t]he *Walker* court . . . dramatically broadened the *Marino* holding to include non-named class members.")

Petitioners submit that *Marino* has no application here, since that case did not in any way address the issue of standing of a *bona fide* class member who participated vigorously throughout the district court proceedings to appeal a ruling directly affecting his or her rights. In any event, *Marino* has not eliminated or resolved the preexisting disagreement among the circuits as to the rights of unnamed class members to appeal judgments that directly affect their interests. *See, e.g., Carlough*, 5 F.3d at 714 (post-*Marino* decision holding that objecting class members may appeal decision approving settlement without intervening); *cf. Bell Atlantic Corp.*, 2 F.3d at 1310 (post-*Marino* decision discussing deep split in circuits and holding that nonintervening, objecting shareholders have standing to appeal approval of settlement of derivative action). The writ should be granted so as to resolve that confusion and protect members of future classes from being caught in the same trap of conflicting precedent that snared petitioners in this case.

II. This Case Presents An Important Question Of Federal Law That Has Not Been, But Should Be, Decided By This Court.

Review is also warranted because this case presents an important question of federal law that should be decided by this Court. The question presented is important because requiring intervention does not simply impose an additional paperwork burden on objecting class members. To the contrary, this requirement has the practical effect of drastically limiting the availability of appellate review of class certification decisions and of the merits of class action settlements. At the same time, the

intervention requirement greatly increases the burdens of class action litigation on class members and the courts -- precisely the opposite result of what the intervention rule ostensibly was intended to achieve.

A. The Intervention Requirement Unduly Limits Objecting Class Members' Rights To Appeal.

The most egregious effect of the intervention requirement is that it operates greatly to restrict the availability of appellate review of both class certification decisions and the merits of class action settlements.[14] Without such review, there is no meaningful procedural check on the actions of district courts. Yet this check is especially critical in the class action context, where there is an inherent danger that unnamed class members' rights may be compromised in favor of the interests of the class representatives (or their attorneys). As the district court itself noted in *Bowling*, "[t]he possibility of collusion exists in class actions. A defendant has an interest in minimizing its liability; class counsel has an interest in his attorney's fee." 143 F.R.D. at 152 (citing John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 883-89 (Summer 1987)). In order to protect against such collusion, the Federal Rules of Civil Procedure require district courts to evaluate the fairness of proposed class action settlements before they can be implemented. *See* Fed. R. Civ. P. 23(e). However, absent appellate review, "even the most conscientious and diligent judge may be tempted to overlook what are often eleventh hour objections to settlements . . . ." Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. at 947. Thus, any rule limiting appellate review of class action settlements increases the potential for unfair,

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[14] Although the Supreme Court has never held that due process requires appellate review of lower court decisions, *see, e.g., Lindsey v. Normet*, 405 U.S. 56, 77 (1972), Congress has conferred appellate jurisdiction on the courts of appeals from "all final decisions of the district courts." 28 U.S.C. § 1291.

collusive settlements that are not in the best interests of the class. This is precisely the result the drafters of Rule 23 sought to avoid by prohibiting the dismissal or compromise of class actions without judicial approval.

Appellate review is equally important with respect to class certification decisions. This Court has recognized that "actual, not presumed, conformance with [the certification requirements of] Fed. R. Civ. P. 23(a) remains . . . indispensable." *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). One essential way to ensure that the "actual conformance" standard has been met is to permit appellate review of certification decisions. *Id.* Any restrictions on the availability of such review invites district courts to deviate from the certification requirements on which absent class members' rights depend -- a result directly contrary to this Court's decision in *Falcon*.[15]

The intervention requirement limits the availability of appellate review in two ways. First, many class members will simply fail to intervene, either because they are not represented by counsel or are unaware that intervention is required in order to preserve their rights to appeal.[16] Second, and perhaps more importantly, even objectors who *do* move to intervene may be deprived of their opportunity to appeal a class certification or a settlement's approval by adverse decisions on their intervention motions.

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[15] In this case, for example, a major portion of petitioners' appeal on the merits argued that the district court's certification of the *Bowling* class fell far short of "actual conformance" with Rule 23. Yet the Sixth Circuit's dismissal of petitioners' appeal effectively rendered the certification decision absolutely immune from scrutiny.

[16] The danger that class members will unwittingly forfeit their appellate rights is made more likely where, as in this case, the class notice places stringent conditions on the right to participate in the district court proceedings that do *not* include the need to file a motion to intervene. RA 43.

Rule 24 of the Federal Rules of Civil Procedure provides for two types of intervention: intervention as of right and permissive intervention. Intervention as of right is available only if the proposed intervenors demonstrate that they are not being adequately represented by existing parties. *See Bradley v. Milliken*, 828 F.2d 1186, 1191 (6th Cir. 1987). Satisfying this requirement is extremely difficult under *any* circumstances;[17] it is even harder where, as here, a proposed settlement is reached prior to class certification, and a conditional settlement class is certified without the district court having considered the adequacy of representation. Intervention motions can be expected to fail at this stage because there is a presumption (especially after a court has certified a conditional settlement class, as was done here) that all class members' interests are represented adequately, "against which the petitioner must demonstrate adversity of interest, collusion or non-feasance." *International Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.2d 964, 967 (5th Cir. 1978) (quoting *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976)). Making such a demonstration on a bare record is difficult, if not impossible. Thus, as a practical matter, intervention as of right could easily be denied in cases where the class action is settled at

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[17] In general, "the applicant for intervention bears the burden of demonstrating inadequate representation." *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 293 (6th Cir. 1983). This requires "overcom[ing] the presumption of adequacy of representation that arises when a proposed intervenor and a party to the suit . . . have the same ultimate objective." *Wade v. Goldschmidt*, 673 F.2d 182, 186 n.7 (7th Cir. 1982) (per curiam). An applicant for intervention fails to meet its burden of demonstrating inadequate representation "when no collusion is shown between the representative and an opposing party, when the representative does not have or represent an interest adverse to the proposed intervenor, and when the representative has not failed in its fulfillment of his duty." *Id.* A mere disagreement over litigation strategy does not, in and of itself, establish inadequacy of representation. *Bradley*, 828 F.2d at 1192 (citation omitted).

an early stage of the litigation.[18]

In addition, in its opposition to petitioners' motion to intervene in this case, Pfizer argued that intervention as of right is actually *foreclosed* when the class action has been certified under Rule 23(b)(3), which gives absent class members the right to opt out. *See Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 332 (5th Cir. 1982); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 289 (N.D. Cal. 1976). Thus, in Pfizer's view, petitioners were limited to seeking permissive intervention under Rule 24(b). If true, this would pose an even more formidable barrier to appeal, since "[i]ntervention under Rule 24(b) is addressed to the sound discretion of the trial court." *Afro American Patrolmens League v. Duck*, 503 F.2d 294, 298 (6th Cir. 1974) (citation omitted). Moreover, a decision denying permissive intervention may be overturned only upon a showing that the district court abused its discretion -- a very rare event indeed. *See Bradley*, 828 F.2d at 1194; Moore, 3B *Moore's Federal Practice*, ¶ 24.15 at 24-152 (reversal for abuse of discretion of district court order denying permissive intervention is "exceedingly rare").

Because of these hurdles, decisions denying motions to intervene in the class action context are legion. *See generally* Wright, 7B *Federal Practice and Procedure*, § 1799 at 443-46 nn. 16-18. Thus, the rule requiring intervention as a prerequisite to appeal could operate greatly to restrict appellate review of class certification decisions and class action settlements. The fact that three (and arguably four) of the courts of appeals have adopted a

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[18] The Sixth Circuit has also held that it is proper to deny a motion to intervene in cases where the applicant "had availed herself of other adequate means of asserting her rights . . ." by filing a separate action. *Head v. Jellico Housing Auth.*, 870 F.2d 1117, 1124-25 (6th Cir. 1989). Application of this principle in this case could conceivably have foreclosed any intervention motion by petitioners, who were the named plaintiffs in the *Taylor* class action, even though approval of the *Bowling* settlement ultimately extinguished the *Taylor* class.

rule that circumscribes the availability of such review illustrates the importance of this case and is an independent reason why review by this Court is warranted and essential.

B. The Intervention Requirement Greatly Increases The Burdens On Litigants And The Courts.

Not only does the intervention requirement restrict appellate review of the merits of class action settlements, but it also greatly increases the burdens on litigants and the courts by enmeshing them in intervention-related proceedings. Ironically, several courts have justified the intervention requirement on the theory that permitting nonintervening objectors to appeal class action settlements will render the litigation "unwieldy." *Guthrie*, 815 F.2d at 628. *Accord Croyden*, 976 F.2d at 678; *Walker*, 858 F.2d at 1074. In fact, however, the rule espoused by these courts will result in greatly protracted and burdensome class action litigation.

In jurisdictions where intervention is required in order to appeal, every class member who is represented by counsel would presumably seek to intervene to leave open the possibility of an appeal. Due to the timeliness requirement of Rule 24, the time for filing intervention motions would likely begin to run when the would-be intervenor first received notice of the proposed class settlement and the fairness hearing date. This would force objectors to file their motions to intervene well before the fairness hearing commenced, even if the motions to intervene were filed solely out of an abundance of caution. Indeed, it would likely be necessary for the district court to rule on the intervention motions prior to the fairness hearing, so that the court and other parties would know how to treat the would-be intervenors.

Each separate motion to intervene would be entitled to full judicial consideration. Moreover, as the courts observed in *Guthrie*, 815 F.2d at 628, and in *Walker*, 858 F.2d at 1074, an order denying a motion to intervene as of right is a final,

appealable order that must be appealed from *immediately*, or the right to appeal is lost. The result would be that if the district court denied all or some of the motions to intervene (a highly possible outcome given the difficulty of establishing inadequacy of representation at this stage of the proceeding, *see* n.17, *supra*), there could be immediate appeals of the denials of intervention, and, if a stay is granted, a postponement of the fairness hearing while the appeals were being resolved.

The rule requiring intervention thus results in segmented appeals. While the appeals of rulings on the motions to intervene are pending, the class may have to wait for the results of the appeals before a fairness hearing can be held. The benefits of the proposed settlement are potentially delayed, and possibly jeopardized, if the settling defendant experiences a reversal of fortune when the intervention appeals are being decided. In cases where the settlement provides for class counsel's fees to be paid out of the settlement funds obtained for the class, the class members will ultimately pay the cost of intervention-generated litigation and appeals.[19]

For these reasons, requiring intervention as a condition of appeal not only burdens and elongates fairness hearings, but

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[19] An additional complicating factor is that the notice sent to class members typically offers little more than a thumbnail sketch of the litigation and a cursory outline of the main settlement terms. As a result, the notice often does not provide an adequate basis for class members to evaluate the adequacy of representation. It is not until the fairness hearing that problems in the adequacy of representation are likely to become evident to class members. This sets the stage for motions to intervene to be filed by the most skeptical class members immediately upon receiving class notice, with the probability that, if those motions are denied, and the denials are affirmed on appeal, a second wave of motions to intervene will be filed after the fairness hearing finally commences. The second wave of motions could bring the fairness hearing to another halt if they too are denied, and the denials are appealed. This startling prospect is "precisely the multiplicity of activity which Rule 23 was designed to avoid . . .." *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 550-51 (1974).

diverts scarce judicial resources from the already complex process of evaluating class actions settlements. As one commentator has aptly summarized, the intervention requirement "produces more work for the district court (a formal motion in addition to the settlement hearing), no savings of time for the appellate court (in both cases it has conducted an appeal) and results in no review of the much more basic issue (the fairness and reasonableness of the settlement) by either court." Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 Univ. Chi. L. Rev. at 954. Preventing this waste is another important reason why review should be granted.

III. The Decision Dismissing Petitioners' Appeal Violated Their Right To Due Process And Is Such An Extreme Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The third reason the writ should be granted is because, in dismissing petitioners' appeal when neither the class notice nor published Sixth Circuit decisions notified petitioners that intervention was required, the Sixth Circuit not only violated petitioners' right to due process, but it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Petitioners' odyssey began in February of 1992, when they were notified, for the first time, that a district court in Cincinnati had certified a global settlement class that could subsume the claims of the putative class in *Taylor*. There was no suggestion in the class notice that petitioners would have to intervene in order to have standing to appeal a decision approving the settlement over their objections. Given that due process requires that notice to a class member in a Rule 23(b)(3) class action must fully describe the action and the absent plaintiff's rights in it, *see Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985), and that the Sixth

Circuit's own published decisions unequivocally and unanimously hold that intervention is *not* required to confer standing on an objecting class member to appeal a district court decision approving a settlement, *see Sertic*, 459 F.2d at 579; *Cohen*, 127 at F.2d 724, petitioners had no reason to suspect that intervention would be a condition of appeal.

Petitioners were further lulled into a false sense of security by the actions of the settling parties and of the district court throughout the fairness hearing. Although petitioners were full participants throughout the proceedings (including filing motions, objections, discovery requests, and briefs and participating in numerous hearings, including the fairness hearing), neither Pfizer nor class counsel *ever* objected to petitioners' standing until their notice of appeal was filed. As for the court, not only did it grant petitioners' formal motion to be heard at the fairness hearing, *see Bowling*, 143 F.R.D. at 147, but it treated petitioners as *de facto* intervenors throughout the proceedings, *see* n.5, *supra*, and even went so far as to permit petitioners to file a *pro forma* fee petition because they intended to appeal the settlement's approval and defer the filing of a comprehensive fee petition *until their Sixth Circuit appeal was resolved*. RA 256. Either the district court was playing games with petitioners (which we doubt), or it, too, understood the law of the Sixth Circuit as not requiring intervention as a condition of appeal. To the extent the district court was operating under this theory, it was not alone: at least two leading commentators on class action proceedings[20] and two

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[20] *See* Wright, 7B *Fed. Practice and Procedure*, § 1797 at 360-61 ("Of course, if the class member appears in response to the notice and puts forth his objections, he can attack the dismissal or compromise on appeal from the entry of the final judgment") (citing, *inter alia*, *Cohen*); Moore, 3B *Moore's Federal Practice* ¶ 23.80[5] at 496 ("[a] member of the class who appears in response to the court's notice given pursuant to [Rule (e)], and objects to the dismissal or compromise has a right to appeal from an adverse final judgment although he did not become a formal party of record") (citing, *inter alia*, *Cohen*); Note, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. at 938 ("since *Cohen* . . . , the principle that an unnamed class member

other circuit courts[21] have identified the Sixth Circuit as *not* requiring objecting class members formally to intervene in order to have standing to appeal.

Despite the foregoing, the Sixth Circuit dismissed petitioners' appeal in an unpublished order that did not even refer to that court's own prior precedent, and instead cited three relatively recent cases from other circuits holding that intervention *is* required to confer standing to appeal. *See* Order reprinted at 1a-2a (citing *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071, 1072 (5th Cir. 1988)).[22]

In so ruling, the Sixth Circuit continued its remarkable trend of issuing unpublished orders that conflict with prior

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who has objected in the court below has standing to appeal an order approving a settlement has been well-established in the Sixth . . . Circuit[ ], and indeed has become the most widely accepted solution to the question at hand") (footnotes omitted).

[21] *E.g., Bell Atlantic Corp.*, 2 F.3d at 1308 (3d Cir. 1993) (identifying Sixth Circuit as one of the courts that allows "unnamed, nonintervening class members standing to appeal approval of settlement agreements"); *Greenfield v. Villages Industries, Inc.*, 483 F.2d 824, 829 (3d Cir. 1973) (citing *Cohen* and *Sertic* for proposition that nonintervening, objecting shareholders have standing to appeal claim that they were wrongfully denied opportunity to participate in class action); *Research Corp. v. Asgrow Seed Company*, 425 F.2d at 1060 (7th Cir. 1970) (citing *Cohen* for proposition that, "[i]f a class member intervenes or even appears in response to a notice pursuant to Fed. R. Civ. P 23(e) and objects to the dismissal or compromise . . . , he has a right to appeal from an adverse final judgment").

[22] The Sixth Circuit did not even address petitioners' argument that, at a minimum, the district court's treatment of them qualified them as *de facto* intervenors under *Smartt v. Coca Cola Bottling Corp.*, 337 F.2d 950 (6th Cir. 1964), *cert. denied sub nom., Chambliss v. Coca Cola Bottling Corp.*, 380 U.S. 934 (1965). *See also Sales v. Marshall*, 873 F.2d 115, 121 (6th Cir. 1989).

published Sixth Circuit precedent on this question. That is precisely what occurred in *Police Officers*, 865 F.2d 260 (Table), and *Thompson*, 827 F.2d 770 (Table), where the Sixth Circuit issued unpublished orders dismissing the appeals of unnamed, nonintervening class members without even mentioning the contrary rule of *Cohen* and *Sertic*. Petitioners understandably were not aware of these unpublished decisions and, in any event, had no reason to predict a similar result in this case; as explained above, the Sixth Circuit's own Internal Operating Procedures provide that only *published* decisions have any precedential value, and that only an *en banc* court can overrule a published Sixth Circuit decision. *See* Sixth Circuit IOP 22.4; *Watts*, 978 F.2d at 270 n.1. Thus, petitioners reasonably relied on the rule of *Cohen* and *Sertic*, only to find that the Sixth Circuit does not adhere to the law it has announced in its published decisions.

Given that Congress has conferred a statutory right to appeal from adverse decisions of district courts, 28 U.S.C. § 1291, the Sixth Circuit's arbitrary denial of that right deprived petitioners of due process of law and should not be permitted to stand. *See Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1, 18 (1987) (once state has created right to appeal, civil litigant "cannot, consistent with due process, be arbitrarily denied the right to a meaningful opportunity to be heard on appeal") (Brennan, J., concurring); *Evitts v. Lucey*, 469 U.S. 387, 405 (1985) (due process requires that, once the state has created a right of appeal, it must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (Fifth and Fourteenth Amendment Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants or as plaintiffs attempting to redress grievances).[23]

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[23] If it was the Sixth Circuit's view that this Court's decision in *Marino* effectively overruled *Cohen* and *Sertic* and dictated the establishment of a new rule requiring intervention (a view that petitioners dispute), then the Sixth Circuit's own procedures mandate that the announcement of that new rule be

Not only is the Sixth Circuit's decision unfair and unconstitutional with respect to petitioners, but it also will likely prejudice class members in pending and future class actions filed in that jurisdiction. As the situation stands, because the Sixth Circuit has yet to overrule *Cohen* and *Sertic* by publishing a decision dismissing the appeal of a nonintervening class member, there is almost no way for class members whose cases are filed in the Sixth Circuit to know that they must formally intervene in order to have standing to appeal. Unless review is granted in this case, any appeals filed by such persons will most likely be dismissed without warning, regardless of the extent of the objectors' participation in the district court proceedings. Thus, the importance of this case extends well beyond the interests of petitioners. Review is necessary to protect the interests of all class members in pending and future class actions filed in the Sixth Circuit.

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published. *See* Sixth Circuit IOP 22.4 ("[d]ecisions determined to have precedential value are published in full-text form in the Federal Reporter"); *see also* Sixth Circuit Local Rule 24(a) (criteria for publication of decisions that "shall be considered by panels" include "whether [the decision] establishes a new rule of law, or alters or modifies an existing rule of law . . ."). Moreover, application of that new rule to the petitioners in this case would be so unfair as to require a holding of nonretroactivity. *See Chevron Oil Company v. Huson*, 404 U.S. 97, 107 (1971) ("'[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding "the injustice or hardship" by a holding of nonretroactivity'") (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)). This was the result in *Gottlieb*, 11 F.3d at 1014-15, where the Tenth Circuit held that objecting class members must intervene in order to have standing to appeal, but declined retroactively to apply its new rule to the class members in that case "in light of the fact that the rule we adopt was not readily apparent prior to our decision in this case . . .." *Id.*

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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Date: June 1, 1994

No. 92-3973

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al.,	)	**FILED**
	)	**DEC 21, 1993**
Plaintiffs-Appellees,	)	**LEONARD GREEN,**
	)	**Clerk**
ELIZABETH W. RIDGEWAY, et. al.,	)	
	)	ORDER
Appellants,	)	NOT RECOMMENDED
v.	)	FOR FULL TEXT
	)	PUBLICATION*
PFIZER, INC., et. al.	)	
	)	
Defendants-Appellees.	)	

* Sixth Circuit Rule 24 limits citations to specific publications. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is to be reproduced.*

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

Elizabeth W. Ridgeway, Rosemary Grunsby, and Fred Grunsby appeal the district court's order approving the settlement of this product liability class action suit. Defendants Pfizer, Inc. and Shiley, Inc. move to dismiss, pursuant to Fed. R. App. P. 27, for lack of jurisdiction.

Because the appellants are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal. *See Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987); *see also Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251.

(1993); *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-75 (5th Cir. 1988). Therefore, the motion to dismiss this appeal is granted.

ENTERED BY ORDER OF THE COURT.

/s/ Leonard Green
Clerk

FILED
Mar 4 -1994
LEONARD GREEN, Clerk

No. 92-3973

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, ET AL.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
ELIZABETH W. RIDGEWAY, ET AL.,	)	
	)	
Appellants,	)	
v.	)	ORDER
	)	
PFIZER, INC., ETC., ET AL.,	)	
	)	
Defendants-Appellees.	)	

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al.,

Plaintiffs, NO: C-1-91-256

vs.

PFIZER, et al. MEMORANDUM

Defendants.

Given that notices of appeal have been filed in this class action (see docs. 258, 278), the Court has concluded because of the uncertainty of its continuing jurisdiction in this case for any purpose, that no application or motion currently pending addressed to this Court will be decided by this Court until this case has been remanded to it by the Court of Appeals for further proceedings, or this Court has been directed by the Court of Appeals to decide any of such pending applications or motions.

SO ORDERED.

Dated: Nov 9, 1992

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States District Judge

No. 92-4297

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al.,	)	**FILED**
	)	**DEC 21, 1993**
Plaintiffs-Appellees,	)	**LEONARD GREEN,**
	)	**Clerk**
ELIZABETH W. RIDGEWAY, et. al.,	)	
	)	ORDER
Class Members-Appellants,	)	NOT RECOMMENDED
v.	)	FOR FULL TEXT
	)	PUBLICATION*
PFIZER, INC., et. al.	)	
	)	
Defendants-Appellees.	)	

* Sixth Circuit Rule 24 limits citations to specific publications. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is to be reproduced.*

BEFORE: RYAN and SUHREINRICH, Circuit Judges; LIVELY, Senior Circuit Judge.

Elizabeth W. Ridgeway, Rosemary Grunsby, and Fred Grunsby appeal the district court's order declining to rule on their belated motion to intervene in this class action. The appellants are unnamed class members who object to the settlement that has been reached between the plaintiff class, represented by Arthur Ray Bowling, and the defendants, Pfizer, Inc., et al. The sole issue in this appeal is whether the district court had jurisdiction to decide the appellant's motion to intervene, which was filed after their notice of appeal was filed. The members of the panel unanimously agree that oral argument is not needed. Fed. R. App. P. 34(a).

On September 10, 1992, the district court issued a sixty-four page opinion approving the settlement of the class action litigation. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992). The appellants filed a notice of appeal on September 17, 1992, and then on September 24, 1992, filed a motion to intervene in the district court. Concluding that the notice of appeal divested it of jurisdiction, the district court declined to rule on the motion to intervene. The appellants now contend that under *United Airlines v. McDonald*, 432 U.S. 385 (1977), a district court retains jurisdiction to consider a motion to intervene even after a notice of appeal has been filed. We disagree.

In *McDonald*, the Supreme Court held that putative class members could intervene for the purpose of taking an appeal of the denial of class certification even though their motion was made after entry of a final judgment. *Id.* at 394-95. In *McDonald*, however, the unnamed class members moved to intervene *before* filing a notice of appeal. *Id.* at 390. In contrast, the appellants filed their motion to intervene *after* filing a notice of appeal.

As a general rule, a notice of appeal deprives the district court of jurisdiction over the action and transfers jurisdiction to the appellate court. *Lewis v. Alexander*, 987 F.2d 392, 394 (6th Cir. 1993). In *Roe v. Town of Highland*, 909 F.2d 1097, 1100 (7th Cir. 1990), the Seventh Circuit held that there simply was no action in which a putative class member could intervene where she filed her motion to intervene on the same day that she filed her notice of appeal. We agree, and we conclude that because the appellant's notice of appeal divested the district court of jurisdiction, the district court quite correctly declined to rule on the motion.

Therefore, the district court's order is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al.,	:	C-1-91-256
Plaintiffs,	:	ORDER
v.	:	
PFIZER, INC., et al.,	:	
Defendants.	:	

This matter is before the Court on the Objecting Pennsylvania Class' ("Movant") Motions to Intervene (doc. 265) and (doc. 267). The Movent [sic] sought leave from this Court to intervene in this action. The Court declined to rule on the motions to intervene, finding that the Court lacked jurisdiction as a notice of appeal had already been filed. The Sixth Circuit affirmed that ruling and by separate order held that the Movent [sic], as unnamed class members who had neglected to intervene in a timely fashion, lacked standing to pursue their appeal objecting to the settlement.

Accordingly, because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class, in the interest of justice, we hereby DENY the Movant's motions to intervene.

SO ORDERED.

Dated: April 5, 1994

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States District Judge

No. 94-3519

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al.	)	**FILED**
	)	MAY 17, 1994
Plaintiffs-Appellees,	)	LEONARD GREEN,
	)	Clerk
ELIZABETH W. RIDGEWAY; ROSEMARY GRUNSBY; FRED GRUNSBY, Class Members, on on behalf of themselves and as representatives on behalf of the Pennsylvania Class Objectors	)	
Appellants,	)	
v.	)	ORDER
PFIZER, INC.; SHELLEY, INC.,	)	
Defendants-Appellees.	)	

Appellants, objector-class members in this product liability class action, appeal the order denying their Rule 60(b) motion seeking reconsideration of the approval of a settlement agreement. In a prior appeal, appellants sought review of the order approving the settlement. That appeal was dismissed on the ground that appellants lacked standing. *Bowling v Pfizer, Inc.*, No. 92-3973 (6th Cir. Dec. 21, 1993). Following that dismissal, the district court denied appellants' motion to intervene on April 4, 1994. On April 12, 1994, the district court denied the Rule 60(b) motion.

Appellants' notice of appeal was filed on May 3, 1994.

Appellants have been denied permission to intervene in this action. It appears, therefore, that they lack standing to appeal the denial of the Rule 60(b) motion. *See Gottlieb v. Wiles*, 11 F.3d 1004, 1008-12 (10th Cir. 1993); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1251 (1993); *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987). Although appellants may have standing to appeal the denial of their motion to intervene, the notice of appeal specifically states that they are appealing the April 12, 1994, denial of the Rule 60(b) motion. Consequently, it does not appear that appellants have standing to pursue this appeal. *See Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 516 (6th Cir. 1991) (a party specifying a certain order in the notice of appeal is precluded from seeking review of other orders on appeal).

Appellants are hereby directed to show cause, within fourteen days of the entry of this order, why this appeal should not be dismissed for lack of jurisdiction.

ENTERED PURSUANT TO RULE 8(b)
SIXTH CIRCUIT RULES

Leonard Green, Clerk,

/s/ Leonard Green